Calendar No. 410

110TH CONGRESS
1st Session

SENATE

REPORT
110–190

FAIR CONTRACTS FOR GROWERS ACT OF 2007

OCTOBER 4, 2007.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 221]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 221), to provide for greater fairness in the arbitration process relating to livestock and poultry contracts, having considered the same, reports favorably thereon and recommends that the bill do pass.

CONTENTS

I. PURPOSE OF THE FAIR CONTRACTS FOR GROWERS ACT OF 2007

A. SUMMARY

Senators Grassley and Feingold introduced the Fair Contracts for Growers Act of 2007 on January 9, 2007. The legislation is cospon-

sored by Chairman Leahy and Senators Hagel, Harkin, Kohl, Johnson, and Durbin. It allows the use of arbitration to resolve a controversy as provided for under a livestock or poultry contract only if, after the controversy arises, both parties consent in writing. The legislation also directs the arbitrator to provide a written explanation of the factual and legal basis for an award. This measure strengthens the arbitration process by ensuring that participants are entering into the process voluntarily.

B. BACKGROUND AND NEED FOR LEGISLATION

As agricultural production becomes increasingly technologically advanced and consolidated under large processors, farmers in some segments of agriculture are increasingly producing their agricultural products under contract with these large processors. Under these contracts, farmers do not own the product they produce; instead, they work to generate produce or animals for large corporations who then process and market what has been grown or raised. This is particularly true in the livestock and poultry sector where farmers are raising animals for corporations such as Perdue, Tyson, and others.

Accordingly, these individual livestock and poultry growers are heavily dependent upon their relationships with their large corporate partners. Once in a contractual relationship with one of these corporate processors, farmers often make significant capital investment to build the facilities needed to raise the animals. These facilities and other investments that farmers make typically are based on the specified needs and requirements of the corporate processor. Moreover, in some regions, the industry is already so concentrated that logistical issues, such as the distance to the processing facility, mean that farmers have few if any viable alternatives. As a result, most farmers do not-and often cannot- switch between corporate processors from year to year.

Taking advantage of the dependence of individual livestock and poultry growers, corporate processors typically present farmers with take-it-or-leave-it contracts, allowing no opportunity for negotiation over the terms of that contract. These non-negotiated contracts then are automatically renewed or extended. During the course of their contractual relationship, processors may inform individual farmers that the existing contract will be amended, altered, or modified in a particular way and that this change is non-negotiable. At no point during the various stages of the livestock and poultry contracting process are farmers provided a true opportunity to negotiate the terms of that contract.

Utilizing their unique advantage in the contract formation, processors often will include provisions that shift risk onto farmers or that otherwise insulate processors from complications or costs. For example, farmers often are provided with young animals, feed, and medicines by processors. If any of these are inferior, farmers are still ultimately judged by the final results. Thus, even if the materials supplied by processors cause mortality or reduced quality, the processors may attempt to deny responsibility and instead shift the risk of loss onto the farmers. Compounding this frustrating catch–22 for farmers is the fact that mandatory arbitration clauses are now standard in most corporate processor contracts. That means that to dispute their responsibility in such a situation, farmers

must work through arbitration rather than through the courts. Indeed, mandatory arbitration clauses force farmers to sign away their constitutional right to a jury trial regardless of the type of dispute, including allegations of fraud, misrepresentation, discrimination, or breach of contract on the part of the corporate processor.

Giving up the protections built into the civil judicial system is not the only detriment that farmers face under mandatory arbitration clauses. Under the arbitration process, farmers must bring their case before a private panel of arbitrators, who often demand up-front fees for access to arbitration. These initial fees are often more than what individual farmers, who struggle to get by from year to year, can afford. As Scott Hamilton, a poultry grower from Alabama, testified at a hearing held by the Senate Agriculture Committee on April 18, 2007, these fees can be as much as $20,000—an amount that is sometimes greater than the amount in dispute. How truly prohibitive these costs can be was illustrated by Mr. Hamilton when he discussed the case of one unfortunate poultry grower:

> In a more recent example in Mississippi, 67 year old Gertrude Overstreet, a contract poultry grower since 1976, was alleging that her poultry company had violated the terms of their agreement, and she wanted to have her case heard in court. Mrs. Overstreet only had two chicken houses so her income before her termination was minimal as shown in the court record. However the company had previously added an arbitration clause to her contract that would require her to pay over $20,000 in up-front costs before she could get an arbitration hearing.
>
> In a rare occurrence, the U.S. District Court recognized the injustice of this arbitration clause and ruled that it was unconscionable and therefore unenforceable. The Court reiterated in its opinion that Mrs. Overstreet and her husband's total monthly income, including food stamps was less than $1,000 per month. The Court further stated that Mrs. Overstreet only had a 10th grade education, had no savings or property, real or personal, other than a car and miscellaneous household appliances. Mrs. Overstreet's testimony that no one from the poultry company had ever explained arbitration to her and she had no idea about the cost of arbitration went uncontested by the poultry company. Additionally, the Court's opinion stated that the Oversteets could not even afford to buy their required medications which were prescribed for them by their doctors. Mr. Overstreet has since passed away. The District Judge in his opinion stated simply that "My conscience is shocked." The poultry company appealed the Judge's ruling and amazingly, the 5th Circuit Court of Appeals panel overturned the District Judge's opinion.

Mr. Hamilton's testimony illustrates how mandatory arbitration clauses can be exploited by corporate processors, for whom an entry fee of $20,000 does not pose a hardship as it does to individual growers, in order to deprive those growers of the opportunity to assert their rights in any forum.

Unfortunately, filing fees are not the only point at which the costs of arbitration may stop the fair resolution of disputes. Indeed, the fact that additional on-going fees may be charged during the

arbitration process makes arbitration even less accessible. Yet after paying these significant fees, the individual farmer is not provided the basic legal protections guaranteed in the civil court system. For example, under the current system, there is no right to receive a written explanation of the arbitrator's decision that includes the facts and law that informed that decision.

The Fair Contracts for Growers Act of 2007 amends the Federal Arbitration Act by adding a new provision in Chapter 1 of Title 9 of the United States Code. This provision sets specific guidelines for arbitration in the livestock and poultry context. Specifically, the new provision establishes that arbitration may be used to settle a controversy under a livestock or poultry contract only if both parties consent to using arbitration after the controversy arises. In this manner, the Act disallows mandatory arbitration clauses to be a condition of contracting with corporate processors and allows individual farmers the opportunity to choose between the civil court system and the arbitration system. The Act also requires that arbitrators of a livestock or poultry dispute provide a written explanation of the factual and legal basis for their decisions.

The Fair Contracts for Growers Act of 2007 is supported by a host of organizations, including the Farm Bureau, the National Farmers' Union, the National Contract Poultry Growers Association and the Campaign for Contract Agriculture Reform.

II. History of the Bill and Committee Consideration

The Fair Contracts for Growers Act of 2007, S. 221, is a bipartisan measure introduced on January 9, 2007, by Senators Grassley and Feingold. Chairman Leahy and Senators Hagel, Harkin, Kohl, Johnson, and Durbin are cosponsors of the bill.

The bill is based on an amendment offered by Senators Feingold, Grassley and Harkin to the Senate version of the 2001 Farm Bill (S. 1731). The amendment (S. Amdt. 2522) passed the Senate on December 13, 2001, by a vote of 64 to 31. Despite its strong bipartisan support in the Senate, the amendment was taken out of the farm bill in conference.

In the 107th Congress, Senator Feingold and Senator Grassley introduced the Fair Contracts for Growers Act as S. 2943 on September 17, 2002. Senators Dorgan, Enzi, Harkin, Johnson and Leahy joined as cosponsors. It was referred to the Judiciary Committee, and no further action was taken.

In the 108th Congress, Senator Grassley and Senator Feingold reintroduced the Fair Contracts for Growers Act as S. 91 on January 7, 2003. Senators Edwards, Enzi, Hagel, Harkin, Johnson, Leahy and Nelson joined as cosponsors. It was referred to the Judiciary Committee, and no further action was taken.

In the 109th Congress, Senator Grassley and Senator Feingold reintroduced the Fair Contracts for Growers Act as S. 2131 on December 16, 2005. Senators Hagel, Harkin, Johnson and Kohl joined as cosponsors. It was referred to the Judiciary Committee, and no further action was taken.

The Fair Contracts for Growers Act of 2007 was listed on the Judiciary Committee's agenda for the first time on April 12, 2007. On May 17, 2007, the Committee considered the bill, and prior to voting to report it, the Committee defeated two amendments offered by Sen. Hatch on behalf of Sen. Kyl.

The rollcall vote on the amendment, offered by Senator Hatch on behalf of Senator Kyl, allowing state law to supersede the federal standards established in the bill was as follows:

Tally: 6 Yes, 11 No, 2 Not Voting.

Democrats (10): N, Leahy (D–VT); N, Kennedy (D–MA); N, Biden (D–DE); N, Kohl (D–WI); N, Feinstein (D–CA); N, Feingold (D–WI); N, Schumer (D–NY); N, Durbin (D–IL); N, Cardin (D–MD); N, Whitehouse (D–RI).

Republicans (9): P, Specter (R–PA); Y, Hatch (R–UT); N, Grassley (R–IA); Y, Kyl (R–AZ); Y, Sessions (R–AL); NV, Graham (R–SC); Y Cornyn (R–TX); Y, Brownback (R–KS); Y, Coburn (R–OK).

The rollcall vote on the amendment, offered by Senator Hatch on behalf of Senator Kyl, allowing mandatory arbitration but including some procedural protections during the arbitration process was as follows:

Tally: 6 Yes, 11 No, 2 Not Voting.

Democrats (10): N, Leahy (D–VT); N, Kennedy (D–MA); N, Biden (D–DE); N, Kohl (D–WI); N, Feinstein (D–CA); N, Feingold (D–WI); N, Schumer (D–NY); N, Durbin (D–IL); N, Cardin (D–MD); N, Whitehouse (D–RI).

Republicans (9): P, Specter (R–PA); Y, Hatch (R–UT); N, Grassley (R–IA); Y, Kyl (R–AZ); Y, Sessions (R–AL); NV, Graham (R–SC); Y, Cornyn (R–TX); Y, Brownback (R–KS); Y, Coburn (R–OK).

The Committee then ordered the Fair Contracts for Growers Act, without amendment, to be reported favorably to the full Senate, with a recommendation that the bill do pass. The rollcall vote on this proposition was as follows:

Tally: 11 Yes, 2 No, 6 Not Voting.

Democrats (10): Y, Leahy (D–VT); Y, Kennedy (D–MA); Y, Biden (D–DE); Y, Kohl (D–WI); Y, Feinstein (D–CA); Y, Feingold (D–WI); Y, Schumer (D–NY); Y, Durbin (D–IL); Y, Cardin (D–MD); Y, Whitehouse (D–RI).

Republicans (9): P, Specter (R–PA); P, Hatch (R–UT); Y, Grassley (R–IA); N, Kyl (R–AZ); P, Sessions (R–AL); P, Graham (R–SC); N, Cornyn (R–TX); P, Brownback (R–KS); P, Coburn (R–OK).

III. Section-By-Section Summary of the Bill

Sec. 1. Short title

This section provides that the legislation may be cited as the "Fair Contracts for Growers Act of 2007."

Sec. 2. Election of arbitration

This section defines the key terms of the legislation. It establishes that both parties to a livestock or poultry contract must consent to arbitration after the dispute arises. It also requires that an explanation of the basis for any awards made through the arbitration process be provided in writing and with a discussion of the factual and legal basis for that decision.

Sec. 3. Effective date

This section establishes the effective date of the legislation. It specifies that the amendments made by Section 2 shall apply to a contract entered into, amended, altered, modified, renewed, or extended after the date of enactment of this Act.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 221, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

JUNE 13, 2007.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 221, the Fair Contracts for Growers Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Daniel Hoople.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 221—Fair Contracts for Growers Act of 2007

S. 221 would amend federal law governing the use of arbitration in certain contracts with poultry and livestock growers. Under the bill, any dispute arising from a contract involving a livestock or poultry producer that is entered into or modified in any way after the date of enactment would be subject to arbitration only in situations where all contracting parties give written consent to its use. If arbitration is elected, the arbitrator would be required to provide a written explanation of the factual and legal basis for any award determination.

CBO expects that the number of disputes heard in federal and state courts would increase under the bill; however, such an increase would likely have an insignificant effect on the courts' overall caseload. As such, CBO estimates that implementing S. 221 would have no significant cost over the next five years. Enacting the bill would have no effect on direct spending or revenues.

S. 221 would impose no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

S. 221 would impose private-sector mandates, as defined in UMRA, on parties involved in livestock or poultry contracts that provide for arbitration and on arbitrators elected to resolve disputes under those contracts. The bill would impose a mandate by requiring such contracts to allow arbitration only after both parties in a dispute agree in writing to arbitration after the controversy arises. The bill also would require an arbitrator elected to resolve a dispute in such cases to provide the parties with a written explanation of the factual and legal basis for the award. Based on information from industry sources, CBO estimates that the direct cost of those mandates would fall well below the annual threshold established in UMRA ($131 million in 2007, adjusted annually for inflation).

The CBO staff contacts for this estimate are Daniel Hoople (for federal costs) and Paige Piper/Bach (for the private-sector impact).

This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

V. Regulatory Impact Evaluation

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 221.

VI. Conclusion

Enactment of the Fair Contracts for Growers Act, S. 221, is long overdue. This bipartisan legislation will ensure that the individual farmers who produce livestock and poultry are able to make a meaningful choice between arbitration and civil litigation when resolving disputes under their livestock and poultry contracts with large corporate processors.

VII. ADDITIONAL VIEWS OF SENATORS FEINGOLD, DURBIN, AND KENNEDY

We fully support S. 221 and the committee report. We provide these additional views to respond to the minority views filed by Senators Kyl, Specter, and Brownback, which primarily include criticism of a bill that the committee has not yet considered, the Arbitration Fairness Act, S. 1782. We are cosponsors of that legislation, which would render unenforceable pre-dispute arbitration agreements in consumer, employment, and franchise contracts.

The primary assertion of the minority views is that both S. 221 and S. 1782 will eliminate the option of arbitration, which will cause great economic hardship to defendant companies. They assert, for example, that S. 1782 would mean that "every dispute would have to go to court," and that:

> [O]nce arbitration agreements are rendered null and void by this Act [S. 221], there will be nothing "voluntary" about the litigation that parties will be forced to endure. The bill's assault on "mandatory" arbitration is more clearly and accurately described as the creation of mandatory and unavoidable litigation.

Reading these pronouncements, one might think that the bills actually prohibit arbitration. They do not. Under both S. 221 and S. 1782, parties to a dispute remain free to choose arbitration rather than litigation. And we are confident that many will. But the very fact that the minority views assume that arbitration will never take place if corporations cannot force farmers, or consumers, or employees to go to arbitration by putting an arbitration clause into a take-it-or-leave-it contract speaks volumes. If arbitration is such a wonderfully fair and efficient alternative to litigation, why wouldn't a consumer or a worker choose it voluntarily?

The point of S. 221, and of S. 1782, which we hope the committee will consider at some point in the future, is to give parties who have a dispute a choice, after the dispute arises, of how they want to resolve it. If arbitration is as fair and cost-efficient as the defenders of mandatory arbitration argue, then surely farmers, consumers, and employees will choose it when they have the freedom to make a real choice. The problem with the current system, as years of experience have shown in the area of agricultural contracts, is that arbitration has proven very beneficial and efficient for the large repeat player, but not so for the individual farmer, grower, consumer or employee. Indeed, one effect of S. 221 may be that once the farmer has a real choice, arbitration programs will have a much greater incentive to make their systems fair if they want to stay in business.

The amendment offered by Senator Kyl during the committee's markup of S. 221 to give the parties the right to discovery and to a written decision in arbitration was not a serious effort to repair an arbitration system that farmers have come to see as stacked against them. A bill similar to S. 221 passed the Senate by a wide margin as an amendment to the farm bill in 2002. Between that time and the date of the committee action, defenders of the current system made no effort to move legislation to improve the arbitration process. Farmers have waited long enough for Congress to respond to their grievances. Alternative half-measures hastily concocted only when legislation designed to help them is finally moving are not enough.

We say half-measures because Senator Kyl's amendment did not even come close to rectifying the problems with the current arbitration system. For example, there is generally extremely limited judicial review of arbitration decisions. Individuals who find themselves in mandatory binding arbitration are often unable even to challenge the format and procedures that may generate an unjust result.

In addition, farmers have no way of knowing how often the arbitrators they must use under the contract have ruled in favor of agribusiness in similar cases. Some arbitration systems do not even require that the arbitrators follow applicable law. Another issue that the amendment did not address is the availability and cost of transcripts of the arbitration proceedings. The list goes on and on. The defeat of Senator Kyl's amendment was not a result of a partisan unwillingness to recognize a good faith effort to "fix" mandatory arbitration. (As the committee report correctly notes, a bipartisan majority of the committee voted against each of the Kyl amendments.) It was defeated because it was too little, too late.

The minority views reserve their greatest scorn for S. 1782, which has not yet been considered by the committee. We see no reason to respond in detail to the one-sided discussion of a supposedly typical employment discrimination case that now often must go to arbitration, but could be filed in court under that bill. We could easily describe actual employment discrimination complaints rejected without analysis or legal basis by arbitrators handpicked by employers, and would note that Congress passed the Civil Rights Act of 1964 and other civil rights statutes to give workers the ability to take their grievances to court, not to a biased arbitration panel. In any event, we look forward to the committee's future work on our bill because mandatory arbitration is just as much of a problem for consumers and employees as it is for farmers. We are confident that a record will be developed to support our bill, and we reject the portrait of exploding, extortionist employment litigation that the minority views paint.

The Federal Arbitration Act of 1925 was passed to allow the courts to recognize and enforce alternative dispute resolution. But with the help of a few mistaken court decisions, it has become a weapon in the hands of big business to avoid the laws that Congress and state legislatures pass to protect consumers and employees, and yes, farmers. Big companies are making use of a parallel but very different legal system and forcing those they do business with to participate in it. We make no apologies for wanting to re-

verse the alarming trend of mandatory pre-dispute arbitration agreements, and look forward to Congress enacting S. 221 and other similar legislation to restore the primacy of the rule of law.

RUSSELL D. FEINGOLD.
RICHARD DURBIN.
EDWARD M. KENNEDY.

VIII. MINORITY VIEWS OF SENATORS KYL, SPECTER, AND BROWNBACK

With this Act, the Senate Judiciary Committee starts the process of repealing the Federal Arbitration Act of 1925. Without holding a single hearing on the subject, the committee begins to turn back the clock on over 80 years of alternative dispute resolution in this country.

It is bad enough that American families will be forced by this legislation to pay more for poultry and other produce so that the trial lawyers can get their cut. Unfortunately, however, the new Congress's assault on the arbitration system is not limited to contracts involving poultry and livestock. Already, two majority members of this committee have introduced the so-called "Arbitration Fairness Act of 2007," S. 1782, which would gut arbitration agreements that cover "employment, consumer, or franchise disputes" or that involve parties with "unequal bargaining power." That's pretty much everything, folks. No longer would American businesses be able to avoid going to court over garden-variety disputes whose amount in controversy is overwhelmed by the costs of paying for a lawyer and going to trial—the types of disputes whose only reasonable method of resolution is arbitration. Instead, every dispute would have to go to court—or, more realistically, would be settled for a nuisance payment, regardless of the merits of the complaint. And to top it all off, the bill's "unequal bargaining power" exception should ensure enough litigation over its meaning to put many a lawyer's children through college.

Allow us to explain why arbitration is necessary—why Congress endorsed its use over 80 years ago, and why all of the intervening Congresses, mostly under the control of Democratic majorities, have been content to preserve this system. The best reason for arbitration is that for many disputes, the cost of litigating the matter in court grossly exceeds the amount at issue. For example, in an employment dispute, if the plaintiff raises *McDonnell-Douglass* "inference of discrimination" claims, the defendant will be required to produce papers and defend depositions regarding not only the work history of the plaintiff employee, but also of all similarly situated employees. Even if the plaintiff's claims are utterly devoid of merit, simply hiring the lawyers and going through discovery, depositions, and summary judgment motions can easily cost the defendant over $250,000. And of course, most jobs in this country pay only a fraction of that amount.

Think about the position in which Congress would be placing a small employer—one whose resources do not permit retention of in-house counsel and who lacks a bottomless litigation budget. Imagine that this employer has an employee whose performance and work habits are substandard, and so he fires that employee. The employee then turns around and sues the employer, alleging var-

ious forms of unlawful discrimination. The annual pay for the job in question is only $40,000. But the employer must now retain an attorney, and that attorney explains to the employer that litigating the case through its conclusion will cost over $250,000.

What do the proponents of this legislation expect such an employer to do? Do they think that every employer—regardless of its size—should be forced to pay a quarter of a million dollars for the privilege of firing a nonperforming employee? Surely even U.S. Senators cannot be so unfamiliar with the reality of the private economy that they believe that every fired employee's legal complaint is meritorious. Do they think that fired employees, and especially their lawyers—who will need no time at all to appreciate the economic dynamics of this new system—will not take advantage of their leverage in such a situation?

What *will* happen if Congress guts arbitration is this: every employer, regardless of its size, will begin to settle employment discrimination suits for their nuisance value. Private employers are not in business to win employment lawsuits. They are in business to make money. And if confronted with the alternatives of "winning" a lawsuit for $250,000, or paying $15,000 and attorney's fees to a nonperforming employee in order to make him go away, employers will simply pay the ransom. It is the only economically reasonable thing to do. And Congress will have been a party to this extortion.

Allow us to also dispel the notion that this Act is intended to "fix" arbitration. This Act is not designed to fix the system, but to gut it. One of the majority report's complaints about poultry-contract arbitration—one of the supposed causes for this legislation—is that "under the current system, there is no right to receive a written explanation of the arbitrator's decision." Yet during the mark up of this bill, an amendment was offered on behalf of Sen. Kyl that would have done just that—that would have preserved arbitration while creating a right to demand that an arbitrator explain his decision in writing. The Kyl amendment also would have empowered the arbitrator to order the discovery of documents. Yet that amendment was defeated on a party-line vote. For all of the alleged problems with arbitration that are described in the majority report—problems, by the way, that were never identified in any hearing before the committee with jurisdiction over this bill—the purpose of this bill is not to address those problems. The purpose of this bill is to gut arbitration.

Two other aspects of this legislation highlight just how extreme the bill is. First, the Act applies retroactively—it not only prevents parties from entering into enforceable arbitration agreements in the future, it also guts arbitration agreements that were made years before this legislation was even proposed. It simply takes pre-existing contracts and tears them up.

Second, this bill's violence against private contracts is not limited to agreements enforceable under federal law. The Act also reaches into state jurisdiction, gutting contracts voluntarily entered into between parties who are operating in the same state and whose agreements would be enforceable in state courts as a matter of state law. This Act preempts the laws of all 50 states, preventing any state from preserving enforceable arbitration as an alternative

to courtroom litigation. Again, an amendment was offered in the committee that would have limited the damage done by this Act to agreements sought to be enforced under federal law, and that would have preserved agreements that are enforceable in state court pursuant to state law. Again, the amendment was defeated on a party-line vote.

The majority report also cites the high up-front fees sometimes charged for poultry arbitrations as a justifying cause for this legislation. Again, had this problem even been identified in a hearing before this committee prior to the mark up of the legislation, surely some agreement could have been reached on a standard for limiting such fees. Obviously, it is not necessary to retroactively gut both federal and state arbitration in order to regulate such fees. Moreover, we find it somewhat ironic that the majority expresses such concern over a $20,000 fee for conducting an arbitration. If arbitration is no longer an enforceable option, the costs imposed on defendants both large and small by courtroom litigation can be expected to exceed arbitration fees by an order of magnitude.

The majority report and proponents of the bill complain of "mandatory" arbitration. What they really object to is enforceable arbitration. The Act prevents private parties from entering into *any* enforceable agreement to arbitrate these disputes—even if such an agreement is entirely voluntary. It is the bill's ban on arbitration agreements that is properly characterized as mandatory. And once arbitration agreements are rendered null and void by this Act, there will be nothing "voluntary" about the litigation that parties will be forced to endure. The bill's assault on "mandatory" arbitration is more clearly and accurately described as the creation of mandatory and unavoidable litigation.

Harnessing the ancient political power of farmers to the legislative agenda of the Association of Trial Lawyers of America, this committee turns back the clock on over 80 years of the development of the arbitration system in this country; it drives up the costs that Americans will be forced to pay to feed their families; and it ensures that the legal system will be used to extract nuisance settlements from small businesses that will now have no enforceable alternative to the expense of courtroom litigation. With regard to this last effect, it is a shame that this committee, in particular, would be a party to facilitating such abuses. We should never knowingly permit the legal system to be used as a vehicle for litigation extortion.

This is a terrible bill. And it is a bad omen of things to come.

JON KYL.
ARLEN SPECTER.
SAM BROWNBACK.

IX. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 221, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

9 U.S.C. §17

§ 17. Livestock and Poultry Contracts

(a) DEFINITIONS.—In this section:

(1) LIVESTOCK.—The term "livestock" has the meaning given the term in section 2(a) of the Packers and Stockyards Act, 1921 (7 U.S.C. 182(a)).

(2) LIVESTOCK OR POULTRY CONTRACT.—The term "livestock or poultry contract" means any growout contract, marketing agreement, or other arrangement under which a livestock or poultry grower raises and cares for livestock or poultry.

(3) LIVESTOCK OR POULTRY GROWER.—The term "livestock or poultry grower" means any person engaged in the business of raising and caring for livestock or poultry in accordance with a livestock or poultry contract, whether the livestock or poultry is owned by the person or by another person.

(4) POULTRY.—The term "poultry" has the meaning given the term in section 2(a) of the Packers and Stockyards Act, 1921 (7 U.S.C. 182(a)).

(b) CONSENT TO ARBITRATION.—If a livestock or poultry contract provides for the use of arbitration to resolve a controversy under the livestock or poultry contract, arbitration may be used to settle the controversy only if, after the controversy arises, both parties consent in writing to use arbitration to settle the controversy.

(c) EXPLANATION OF BASIS FOR AWARDS.—If arbitration is elected to settle a dispute under a livestock or poultry contract, the arbitrator shall provide to the parties to the contract a written explanation of the factual and legal basis for the award.

○